

January 24, 2006 (Revised)

TO: Natural Resource Damage Assessment and Restoration Advisory Committee

FROM: The Q2 Subcommittee: John Bascietto, Bill Bresnick, Bill Brighton, Stephen Kress, Pat Montanio, Craig Potter, and Shannon Work

RE: Proposed Scope of Question 2 and Process Issues for Consideration by the Committee

This subcommittee has been asked to consider the question:

Should DOI's Regulations provide additional guidance for determining whether direct restoration, rehabilitation, replacement, or acquisition of equivalent resources is the best strategy for addressing natural resource injuries?

We identify below several embedded issues and questions which, subject to the full Committee's concurrence and/or guidance, we propose to address. We have begun compiling background information on the origin and interpretation of DOI's existing criteria for selecting restoration, replacement, rehabilitation, or acquisition projects; the overlapping but somewhat different criteria in NOAA's NRDA rule under the Oil Pollution Act; and relevant Department of Energy and Department of Defense guidance documents. We are also beginning the first stage of what we envision as a multi-stage process to identify any cases where parties perceive that the existing criteria and procedures impeded or prevented the selection of desirable projects or otherwise led to a poorer-than-necessary outcome. Initially, we are limiting our research to immediate colleagues or other Committee members, but, as discussed below, we hope later to survey NRDA practitioners more broadly. In addition, we recommend that a state lawyer or NRD program official be added to this subcommittee to help us gain access to the uniquely-broad experience and perspectives of the states on this topic.

I. Proposed Scope of Inquiry

A. Criteria for selecting among alternative restoration, replacement, or resource acquisition projects

1. Are the ten criteria listed in the existing rule, 43 C.F.R. § 11.82(d), the right ones or formulated in the best way?
2. Should there be tiers of criteria, as in the NOAA NRDA rule (15 C.F.R. § 990.53-.54) or in the NCP criteria for selecting remedial actions, with one set of threshold factors that any acceptable alternative must meet and a second set of "balancing" factors that must be evaluated but do not provide absolute tests?
3. Should there be a preference for on-site restoration or replacement projects over off-site alternatives (or any other rule tipping the balance towards one or more categories of

alternatives)? [We recognize that DOI previously chose not to adopt such a preference and that its decision on this point was upheld in Kennecott Utah Copper Co. v. Department of the Interior, 88 F.3d 1191, 1229-31 (D.C. Cir. 1996).]

4. Should DOI adopt a "grossly disproportionate to value" limitation on the cost of restoration projects? [We recognize that DOI previously chose not to include a grossly disproportionate test and that this decision was upheld in Kennecott Utah Copper Co. v. Department of the Interior, 88 F.3d at 1218.]

5. Is additional guidance needed on whether, or in what circumstances, it is appropriate to provide compensatory "services" in ways that do not improve or protect the natural environment, for example by building facilities (such as boat ramps or a visitor center) or using artificial measures to provide recreational opportunities (such as stocking non-native recreational fish species)?

6. How should pre-existing regional restoration plans/goals be factored into the selection? [In many parts of the country, federal or state agencies have developed long-term plans for restoration activities in the area, often with buy-in by local governments and some trustee agencies. These plans may present opportunities for restoration/acquisition of "equivalent" resources with minimal investment in a case-specific assessment, but they are not specifically addressed in the DOI rule.]

B. Ways to foster an earlier focus on restoration.

1. Should the NRDA rule be revised to expressly facilitate "integration" of restoration planning and remedial decision-making (e.g., by adding an alternative procedural path consistent with DOE's integrated remedy/restoration selection policy)?

2. Should trustees be required (if they are following the rule) or encouraged to perform an early screening step to identify potential restoration/replacement/acquisition opportunities?

II. Process Issues

The subcommittee has come up with a few ideas for gathering information for which we request assistance or guidance from the Committee or DOI.

1. We suggest that DOI make reference materials available on the Committee website, including the DOI NRDA regulations, the series of Federal Register Notices issued by DOI in the course of promulgating the regulations (i.e., the rule's regulatory history), and any relevant DOI guidance documents. Although these materials are all available from other sources, including other DOI websites, assembling them in a single location would both be convenient for Committee members and help meet the obligation to make documents used by the Committee available to the public.

2. The subcommittee believes that, to assess what (if any) additional guidance is needed on how to choose among restoration/replacement/acquisition alternatives, we should have as broad a perspective as possible on the experiences of interested parties who have attempted to use the existing rule – what problems they have encountered in interpreting or applying the rule’s criteria; any good restoration opportunities that may have been missed because of weaknesses or lack of clarity in the criteria; and positive experiences with the use of other criteria or selection methods that might be incorporated into a revised rule or new guidance. While subcommittee members have extensive experience in the practice of NRDA’s, and Committee members bring even more experience to bear, we think it would be desirable to supplement our base of expertise in two respects.

a. Most urgently, we recommend that a state representative be added to the subcommittee, because we believe that the states have a unique range of viewpoints on this question that none of the current subcommittee members feels well-placed to represent. (While the subcommittee also has no DOI representative, other federal participants are reasonably familiar with DOI’s perspective on many issues or can readily obtain DOI input.) Of course, the Committee includes three members from state trustee agencies who will ultimately be able to weigh in fully on this question, but we believe the subcommittee’s ability to provide well-informed recommendations would be enhanced if we also had state representation at the subcommittee stage.

b. Longer-term, we believe it may be valuable to conduct some form of survey or other systematic outreach to NRDA practitioners outside the Committee, both in the private sector and in government, to seek additional insights and relevant case experiences. At this point, we are only raising this idea for a preliminary discussion of whether it may be appropriate, since we would not be ready to make a specific proposal of this type for some time.